

Leiloa Manoa (Migration) [2019] AATA 763 (4 January 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Aliipaea Leiloa Manoa

CASE NUMBER: 1716472

DIBP REFERENCE(S): CLF2013/238203

MEMBER: Hugh Sanderson

DATE: 4 January 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

Statement made on 04 January 2019 at 8:45am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing partner relationship – children born of the relationship – renting in joint names – joint social activities and church involvement – sponsor travelled regularly to Samoa – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5, 65, 93, 94, 96, 359, 360, 363A, 359, 363A
Migration Regulations 1994, Schedule 2, cl 801.221; r 1.15*

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 July 2017 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 26 September 2013 on the basis of his relationship with his sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied the applicant was in a continuing relationship with the sponsor.

Background

4. The applicant is a citizen of Samoa and is currently 30 years old. The sponsor of the applicant is Ana Leiloa Manoa. She was born in Samoa and is currently 35 years old. She became an Australian citizen in 2005.
5. The parties claim they were first introduced to each other through the applicant's cousin who is a friend of the sponsor. They were introduced over the telephone in June 2010 and regularly spoke with each other after that. In December 2010 the sponsor travelled to Samoa and the parties were married on 23 December 2010. A copy of the marriage certificate has been provided to the Department. The sponsor then returned to Australia. The sponsor spent time between Australia and Samoa for the next two years.
6. The applicant entered Australia on 19 November 2012 holding a subclass 456 visa. The parties commenced living together in Australia after that time. The applicant applied on a number of occasions for the waiver of the no further stay condition of the visa on which he had been granted to enter Australia. This was granted to him on 2 September 2013. He then applied for the current Partner visa. The applicant was granted a subclass 820 Partner (Temporary) visa on 9 March 2015.
7. The Department wrote to the applicant on a number of occasions when assessing the grant of the subclass 801 Partner (Residence) visa. The applicant did not respond to these requests for information.
8. The delegate who considered the application noted that no information had been provided which would indicate the parties were in a continuing relationship. No information had been provided that the applicant would meet any of the criteria for the grant of the visa. The delegate found the applicant did not meet the criteria in cl.801.221 and refused the application.

Information to the Tribunal

9. The applicant and the sponsor have had two children together, Paea born on 2 November 2014 and Zion born on 25 April 2017. The applicant provided further documents to the Tribunal including the following:
 - Birth certificates of their children;

- Photos of the parties together with their children and other family members;
 - Joint bank account statement;
 - Joint residential tenancy agreement;
 - Statements by friends in support of the application; and
 - Statements by the parties in support of the application.
10. In light of the information currently before the Tribunal, the Tribunal has proceeded to a decision without the need for a hearing.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant is the spouse of the sponsoring partner is defined in s.5F of the Act.

Whether the parties are in a spouse or de facto relationship

13. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 23 December 2010 in Samoa. There is nothing to indicate that the marriage between the parties is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

16. The parties provided little information in support of the application. The parties are the joint residential tenants of the property they rent. Joint bank account statements have been

provided, however, they do not indicate any savings pattern or expenditure met by the parties. No information has been provided of any joint assets or joint liabilities of the parties.

17. It is claimed that the applicant is working full-time and has an income of about \$48,000 per annum. The sponsor does not work and provides full-time care for the parties children. She and their children are reliant upon the applicant for their financial support.
18. Although limited, the Tribunal finds that the applicant is financially supporting the sponsor and his children in a manner indicating the parties are in a genuine and continuing relationship.
19. The parties provided details of the home they are renting in their joint names. Various documents have been provided addressed to the parties at the homes they have been renting. The birth certificates of the parties' children indicate that both the applicant and the sponsor were living together in shared accommodation at the time the children were born.
20. The sponsor undertakes the primary responsibility for the care of the children and also maintaining the household. The applicant is the primary income earner for the family. The photos provided by the applicant to the Tribunal show the applicant is involved in the care of his children and they have a good relationship with him.
21. The Tribunal finds that the nature of the household the parties have established is indicative of the parties living together and being in a genuine and continuing relationship.
22. The parties provided statements from various friends attested to the genuineness of their relationship. This includes members of the church they regularly attend. The photos provided by the applicant show the parties and the children together at various social events with other family members and their friends.
23. The Tribunal finds that the parties represent themselves as being married to each other and that their relationship is recognised by their friends and family as being genuine. The parties have undertaken numerous social activities together and continue to attend their church on a regular basis. The Tribunal finds the social aspects of the relationship supports a finding that the applicant and the sponsor have a mutual commitment to a shared life as husband and wife and that their relationship is genuine and continuing.
24. The parties were first introduced to each other over the phone in June 2010. They were married in December 2010. They have now been married for eight years. The applicant only entered Australia in 2013. Before that, the sponsor travelled regularly to Samoa spending extended time there to be able to be with the applicant. Since arriving in Australia, the applicant has been living with the sponsor.
25. The parties have shown a commitment to each other and their relationship which is indicative of a genuine, continuing and exclusive relationship. Most significantly, the parties have had two children together who are currently four years old and 20 months old. This provides the clearest evidence of the parties long-term commitment to each other and that they provide each other the degree of companionship and emotional support which would be expected in a genuine relationship.
26. The Tribunal has considered all the circumstances of the parties both individually and cumulatively. The most significant aspect of their relationship is that they have had two children together. Although the applicant failed to respond to the Department's request to provide further information in support of the application and has provided only limited information to the Tribunal, the Tribunal finds the fact that the parties have had two children

together and continue to provide support for those children provides the clearest indication of the parties being in a genuine and continuing relationship.

27. The Tribunal finds that the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others, that their relationship is genuine and continuing, and that they lived together with their children.
28. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant meets cl.801.221(2)(c).
29. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

30. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221(2)(c) of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).